

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL F. POLYS)	
Claimant)	
VS.)	
)	
FELMAN REMODELING COMPANY)	Docket Nos. 270,857;
Respondent)	270,858; & 270,859
AND)	
)	
AMERICAN FAMILY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the December 31, 2001, Preliminary Decision of Administrative Law Judge Robert H. Foerschler. The Administrative Law Judge granted claimant an examination by an orthopedic surgeon of respondent's choice after finding that the injury to claimant's back, which occurred while claimant was attending authorized physical therapy for his previously injured knee, arose out of and in the course of his employment. Whether claimant's back injury arose out of and in the course of his employment is the only issue before the Appeals Board at this time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds the order of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on April 12, 2001, when he injured his knee. That injury is not in dispute at this time. Additionally, the injury in Docket No. 270,858 to claimant's hand, which occurred when claimant's knee gave out and he fell, is not in dispute. However, while attending physical therapy for the knee, claimant alleges he injured his low back while stretching on a physio ball.

Respondent contends that the use of the physio ball was not part of claimant's authorized physical therapy. The use of this large ball was not part of the prescribed

therapy at any point in claimant's treatment. However, claimant's physical therapist, Hal Ray Simons, testified that the use of the physio ball, while not prescribed, was an accepted method of warming up prior to claimant's physical therapy treatment. Mr. Simons acknowledged he did not actually see claimant use the physio ball and had, only a day or so before, discussed with claimant the uses of the physio ball and had never advised claimant to use the physio ball. However, Mr. Simmons did agree that the use of the physio ball would be acceptable under these circumstances.

There is some contention in the record that claimant may have injured his back in some other fashion. The Board has viewed the videotape placed into evidence by respondent. However, there is no indication on the videotape that claimant suffered any injury performing any depicted activities.

After reviewing the evidence, the Board finds for preliminary hearing purposes that claimant has satisfied his burden of proving that the injury to his back occurred, as he testified, while stretching on the physio ball in preparation for physical therapy. Claimant did, therefore, prove that he suffered accidental injury arising out of and in the course of his employment.

As is always the case, preliminary hearing findings are not binding in a full hearing on the claim, but instead are subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the order of Administrative Law Judge Robert H. Foerschler dated December 31, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director